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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Amendment of Rules and Policies Governing Pole Attachments	)	CS Docket No. 97-98
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	)	

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COMMENTS OF THE
UNITED STATES TELEPHONE ASSOCIATION

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SUMMARY

The most efficient manner for determining just and reasonable pole attachment rates is that of permitting pole owners and attachers to negotiate reasonable agreements. Rates agreed to by pole owners and attachers who may avail themselves of the Commission's pole attachment complaint process should presumptively be deemed reasonable. The pole attachment formula should be applied only when parties are unable to negotiate a just and reasonable rate and subsequently avail themselves of the Commission's pole attachment complaint process. Moreover, states have an important role to play in this process and their authority over such matters should not be infringed upon.

The Commission should exercise the discretion granted to it by Congress and adopt its proposed gross book cost methodology when called upon to resolve disputes between pole owners and attachers. Adoption of this methodology for all LECs will avoid the excessive accumulated depreciation reserve problem first brought to light by Southwestern Bell. Use of the gross book cost methodology obviates the need for accounting corrections like that proposed by the Commission in this proceeding. Furthermore, gross book figures are publicly available, thereby allowing for greater transparency and providing for a more stable and predictable cost recovery mechanism.

The corrected net book methodology proposed by the Commission as an alternative to its gross book methodology is complex, contentious, and severely deficient, and should not be adopted. Application of this methodology would result in rate hikes significantly greater than those that would occur using the proposed gross book methodology. Pole attachers would be subjected to situations wherein their rates, which had been decreasing, suddenly increase

significantly overnight. Moreover, the corrected net book methodology provides fertile ground for disputes regarding the identification and size of the future net salvage amount to be removed from the depreciation reserve.

The Commission should ensure a level competitive playing field by extending the Commission's pole attachment complaint process both to ILEC-to-Utility and Utility-to-ILEC agreements in those states where the Commission has jurisdiction over pole attachments. ILECs are increasingly becoming competitive telecommunications service providers through expansion into new markets. Without an adequate venue to determine just and reasonable rates or to resolve disputes, ILECs will be severely disadvantaged in their ability to compete fairly. Congress did not adequately contemplate the implication of the newly amended Section 224 as it pertains to agreements between ILECs and other utilities. Consequently, the Commission should extend the pole attachment complaint process to cover disputes between ILECs and utilities.

The Commission's mapping of which Part 32 accounts are to be included when calculating the various carrying charge components removes the ambiguity that currently exists and should be adopted. When resolving pole complaints, the Commission should continue to utilize the last known rate of return authorized for LECs' intrastate services by whichever regulatory body has jurisdiction. However, in those cases where the state does not assert jurisdiction over pole rates and no longer authorizes rates of return, the Commission should adopt a rebuttable rate of return of 11.25%. The Commission should also affirm that only pole-related accumulated deferred taxes should be utilized in rate calculations. Dividing gross pole investment by total gross plant investment and then multiplying by total accumulated deferred income taxes improperly introduces non-pole-related deferred taxes into the subsequent rate calculations.

The Commission should apply its proposed gross book methodology when applying the pole attachment formula to conduits. There is no reason to have separate cost methodologies for poles and conduits. Maintaining separate methodologies may cause pricing distortions between pole and conduit rates and only increases the potential for accounting confusion. The Commission's proposed conduit formula is a reasonable proposal and should be relatively easy to administer. Adoption of the half-duct presumption is a reasonable, equitable, and administratively simple method for approximating occupied space that relieves parties of the burden of proving the amount of space actually occupied.

The spatial changes suggested by the electric utilities in the Whitepaper are inappropriate and should not be adopted by the Commission. Placing appurtenances inside the forty inch separation space is practiced predominantly by electric utilities to avoid the cost of pole change-outs. ILECs, CLECs, and CATV place pole-mounted appurtenances below their respective wire attachments because that is the only space available to them as attachers. In many instances, even though the pole-mounted appurtenance is below the wire attachment, it is still above the minimum wire grade level, so it is not occupying unusable space. In those cases where the pole-mounted appurtenance does protrude below the minimum wire grade level, such non-wire appurtenances mounted on the pole in accordance with the NESC pose little or no danger to any worker or passersby.

The Commission should not alter its present rebuttable presumptions about pole heights and average usable space. The suggestion by the electric utilities that ILECs occupy between two and three feet of pole is simply untrue and should be discounted. The arguments put forth by the electric utilities urging the Commission to adopt a greater ground clearance figure are the same as

those that the Commission has previously rejected. The Whitepaper offers no new evidence to suggest that the Commission should not similarly reject these arguments again.

Eliminating thirty-foot poles from the rate calculations would inexplicably exclude significant investment and disproportionately affect ILECs. The electric utilities' contention that thirty-foot poles are too short to accommodate multiple attachments is both incorrect and misleading. Such a conclusion is possible only if the artificial and unnecessary spatial changes suggested by the electric utilities are accepted. Moreover, the notion of identifying and excluding thirty-foot poles contradicts the statement in the Whitepaper claiming that poles are tracked by dollar amount, not individual size.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Amendment of Rules and	)	
Policies Governing Pole	)	CS Docket No. 97-98
Attachments	)	
	)	
	)	

COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION

The United States Telephone Association ("USTA") respectfully submits these comments in response to the Notice of Proposed Rulemaking issued in the above-referenced docket.[1] USTA is the principal trade association of the local exchange carrier ("LEC") industry, with over 1,000 members. USTA's present comments address the Commission's inquiry regarding adjustments to be made to the rules and policies governing pole attachments that will apply until superseded, where appropriate, by new rules and policies to be promulgated at a later date[2] in accordance with Section 224, as amended by the Telecommunications Act of 1996.[3]

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[1] Notice of Proposed Rulemaking, In the Matter of Amendment of Rules and Policies Governing Pole Attachments, CS Docket 97-98, FCC 97-94, released March 14,1997 ("Notice").

[2] See Notice at ¶ 1, footnote 4, and also ¶ 5.

[3] Telecommunications Act of 1996, Public Law No. 104-104, 104 Stat. 56, 149-151, signed February 8, 1996 (to be codified at 47 U.S.C. § 224) ("the Act").

I. Privately Negotiated Pole Attachment Rates Agreed To By Pole Owners And Attachers Who May Also Avail Themselves Of The Commission's Pole Attachment Complaint Process Should Presumptively Be Deemed Just And Reasonable.

The most efficient manner for determining just and reasonable pole attachment rates is that of permitting pole owners and attachers to negotiate reasonable agreements. Congress recognized this when it passed the Pole Attachment Act of 1978.[4] The legislative history of the Pole Attachment Act illustrates that Congress expected that Commission intervention and reliance upon the statutory formula would only be necessary in those instances where the negotiating parties were unable to agree to a mutually acceptable arrangement.[5] Congress reaffirmed this expectation in the Joint Explanatory Statement accompanying the Conference Committee Report of the Telecommunications Act of 1996.[6] Since enactment of the Pole Attachment Act, the Commission has acknowledged Congressional intent by having established and maintained a case-by-case dispute resolution process rather than adopting a uniform rate prescription process. Indeed, recent statements by the Commission indicate that it continues to acknowledge Congress' intent of having parties negotiate pole attachment agreements among

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[4] 47 U.S.C. § 224.

[5] S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977) ("1977 Senate Report") at p. 3. ("The basic design of S. 1547, as reported, is to empower the Federal Communications Commission to exercise regulatory oversight over the arrangements between utilities and CATV systems in any case where the parties themselves are unable to reach a mutually satisfactory arrangement...")

[6] H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. (1996) ("1996 Conference Report") at p. 207. ("The conference agreement amends section 224 of the Communications Act by adding new subsection (e)(1) to allow parties to negotiate the rates, terms, and conditions for attaching to pole, ducts, conduits, and rights-of-way owned or controlled by utilities.")

themselves.[7] Accordingly, if a pole owner and attacher who may also avail themselves of the Commission's pole attachment complaint process are able to reach an agreement on pole attachments rates, the Commission should accede to the attacher's judgement that the rates being charged to it by the pole owner are, in fact, just and reasonable. The pole attachment formula should be applied only when parties are unable to resolve a dispute concerning a just and reasonable rate between themselves and subsequently avail themselves of the Commission's pole attachment complaint process.

Additionally, the Commission's pole attachment complaint process is applicable only in those states that do not regulate pole attachments. Section 224 states that the Commission's jurisdiction does not extend to pole attachments where such matters are regulated by a state.[8] The Commission has continuously recognized this circumscription of its authority, most recently reaffirming this limit in its Interconnection Order.[9] Indeed, in its Interconnection Order , the

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[7] See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325 ("Interconnection Order") at ¶ 1192 ("Congress has provided for compensation to pole owners, in the event that they cannot resolve a dispute with telecommunications carriers regarding charges for use of the owners' poles..."). See also Notice at ¶ 5, footnote 18.

[8] § 224(c)(1).

[9] Interconnection Order at ¶ 1236 ("The authority of a state under section 224(c)(1) to preempt federal regulation in these cases is clear.")(footnote omitted). Moreover, see also Interconnection Order at ¶ 1239 ("Thus, when a state has exercised its preemptive authority under section 224(c)(1), a LEC satisfies its duty under section 251(b)(4) to afford access by complying with the state's regulations... Similarly, when a telecommunications carrier seeks access rights from an incumbent LEC by choosing to avail itself of the negotiation and arbitration procedures established by section 252, a state that has exercised its preemption rights will apply its own set of regulations in the arbitration process pursuant to section 252(c)(1).")

Commission found that a state is not required to assert affirmatively that it regulates such matters.[10] Accordingly, the Commission should continue to recognize and abide by this limitation of its authority vis à vis state jurisdiction.

II. The Commission Should Adopt Its Proposed Gross Book Cost Methodology When It Is Called Upon To Resolve Disputes Between Pole Owners And Attachers.

The Notice inquires whether disputed pole attachment rates should be calculated using gross book costs instead of net book costs.[11] USTA believes that in those instances where the Commission is authorized to resolve pole rate disputes, the upper bound of the zone of reasonableness should be determined using the gross book methodology suggested by the Commission.[12] The Commission is correct when it notes that the legislative history of the Pole Attachment Act -- which was not significantly altered by the 1996 Conference Report -- grants the Commission discretion in selecting a methodology for assessing just and reasonable pole

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[10] Id. at ¶ 1154 ("Thus, even where a state has not asserted preemptive authority in accordance with section 224(c), state and local requirements affecting pole attachments remain applicable, unless a complainant can show a direct conflict with federal policy.")

[11] Notice, ¶ 29.

[12] Notice, ¶ 29, footnote 63. ("The rate of return and income tax carrying charges [would be] computed using net book costs... [T]he carrying charge elements for maintenance, depreciation, and administrative expenses would be calculated using gross book costs for both total plant investment and pole investment.") This method is explicitly illustrated in Appendix A of USTA's comments in this proceeding.

attachments rates.[13] Despite having previously stated a preference for relying upon a net book cost methodology rather than a gross book cost methodology,[14] the Commission should reconsider and abandon this preference in light of the advantages of its own proposed gross book method.

Use of the Commission's proposed gross book methodology has a number of advantages over both the present net book methodology and application of the proposed corrected net book method.[15] The gross book method avoids situations like that illustrated by Southwestern Bell in its original petition for clarification, wherein Southwestern Bell's depreciation reserve exceeded its original investment.[16] For some time now, local exchange carriers have been increasingly

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[13] Notice, ¶ 29. See also 1977 Senate Report at p. 9 ("The methodology selected in this bill is only one of many plausible approaches... A 5-year termination of this formula is imposed to afford the Commission greater leeway to select a more appropriate methodology should experience and changed conditions so dictate. After this 5-year period the Commission would be guided by the "just and reasonable" statutory standard.")

[14] TeleCable of Piedmont, Inc. et al. v. Duke Power Company, Hearing Designation Order, DA 95-1362, (Com. Car. Bur., June 15, 1995) at ¶ 13. See also Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Report and Order, CC Docket No. 86-212, FCC 87-209 ("Pole Attachment Order") at ¶ 37, footnote 21.

[15] Notice at ¶ 23. The Commission's proposed corrected net book method would "eliminate the net salvage amount from the accumulated depreciation balance when the net value of poles becomes negative." (footnote omitted)

[16] Southwestern Bell Telephone Company, Computation of Rates for Attachment of Cable Television Hardware to Utility Poles, Petition for Clarification or in the Alternative, a Waiver, AAD 94-125 (filed August 26, 1994) ("SWB Petition"). The scope of the problem brought to light by Southwestern Bell's petition may not be universal, but the difficulty of discerning under-recovery prior to the pole account balance becoming negative suggests that the problem may be widespread but undiagnosed. In addition to Southwestern Bell, Aliant Communications has diagnosed a similar problem. US West has previously indicated to the Commission (continued...)

relying upon buried plant in preference to aerial plant. Consequently, the pace of pole deployment has slowed sharply compared to its historic growth. However, it would be incorrect to classify poles as a "dying" account. There are today, and will continue to be in the future, many instances where local exchange carriers are unable to utilize buried plant for a variety of reasons, chief among them being prohibitive installation costs. The reduced pace of deployment and concomitant increase in the average age of poles exacerbates the problem of inordinately low pole attachments rates caused by accumulated depreciation reserve accounts exceeding original investment. Switching to the gross book cost methodology will avoid these problems.

Another advantage of using the Commission's proposed gross book methodology follows from the first advantage. Specifically, use of the Commission's proposed gross book method obviates the need for net book method accounting corrections like that proposed in the Notice;[17] corrections necessitated by cost under-recovery caused by use of the current net book cost methodology. Applying an accounting fix to adjust for cost under-recovery is one possible approach toward correcting the problem. However, it is an unnecessary and potentially confusing correction for a problem that could more easily be solved simply by using the proposed

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(...continued) that it, too, is experiencing the problem in at least five of its service region states (Comments of US West in SWB Petition at p. 2, footnote 5.). Southwestern Bell has indicated that the problem, which is presently overt only in the states of Oklahoma and Kansas, will become openly evident in every state within its service region by the year 2002. (This does not take into account the recently acquired service regions of California and Nevada.) USTA believes that the problem is more widespread than is currently recognized. Consequently, USTA believes that the Commission should adopt its proposed gross book methodology for all LECs.

[17] Notice at ¶ 23.

gross book cost methodology. Furthermore, application of the proposed corrected net book method would result in sudden and significant rate increases upwards of more than 410% in some instances.[18]

The Commission's proposed corrected net book method would unnecessarily subject both the pole owner and the attacher to needless rate oscillation. When a pole owner's account goes negative and the net salvage amount is extracted from the depreciation reserve, the attacher is faced with a situation wherein its pole rates, which were decreasing, suddenly increase significantly. Although the magnitude of the sudden rate hikes vary, depending on the circumstances of the ILEC in question, application of the Commission's proposed corrected net book method can result in rates that vary from 36% to 2,456% greater than those developed using the Commission's present uncorrected net book methodology.[19] A sudden increase in pole attachment rates, though necessary to ensure that the attacher is shouldering its appropriate share of the costs, increases the already complex task faced by attachers of forecasting future costs in business planning. In contrast, the proposed gross book method provides for a more stable and predictable cost recovery method.

From the pole owners' standpoint, the sudden rate increases required by the corrected net book method may be both necessary and appropriate, but they will force the owners to expend time and resources defending themselves in complaints filed by attachers unhappy over

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[18] See Appendix B, Table 1.

[19] See Appendix B, Table 1. Although the information contained in this table is by no means exhaustive, it is nonetheless illustrative of what could be expected.

legitimate rate increases. Application of the proposed corrected net book method would give rise to disputes between the pole owner and attacher over the dollar amount of the net salvage identified and eliminated from the accumulated depreciation balance. Moreover, identifying the future net salvage itself can be a very complex and time consuming task for even the largest of LECs. Resolving these disputes will require the pole owner, the attacher, and the Commission to expend otherwise unnecessary resources. In contrast, gross book figures are publicly available in the annual ARMIS filing requirements, thereby allowing attachers to examine the figures for themselves. Although relying upon current ARMIS data reporting requirements would exclude Tier 2 LECs that are pole owners, it would, nevertheless, still provide a large degree of public inspection. The public availability of these gross figures would reduce matters open to dispute.

Another advantage of utilizing the Commission's proposed gross book methodology versus its proposed corrected net book methodology is that of feasibility. As alluded to in the previous paragraph, the Commission is correct in its suspicion that extracting the net salvage effect from the accumulated depreciation reserve could prove difficult.[20] Poles are installed over time at various original costs. The net salvage estimates for these poles also vary over time. Identifying and delineating the net salvage component is a complex task that requires pole owners to expend considerable time and resources. Indeed, disaggregating the account requires extensive record-keeping that has never been required of LECs and is well beyond their respective capabilities.

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[20] Notice, ¶ 28.

III. The Commission's Proposed Corrected Net Book Methodology Is Too Complex, Contentious, And Disjointed And Is Severely Deficient In Comparison To The Commission's Proposed Gross Book Method.

A far less desirable alternative to the Commission's proposed gross book method is its proposed correction of "eliminat[ing] the net salvage amount from the accumulated depreciation balance when the net value of poles becomes negative."[21] USTA agrees with the Commission's statement that removing the net salvage amount would restate the accumulated depreciation account to reflect only the depreciation of the original pole investment.[22] However, although such an adjustment would be necessary absent Commission action to adopt its proposed gross book methodology, the Commission's proposed corrected net book method is severely deficient in comparison to its gross book method proposal. As stated previously, the magnitude of the rate hikes precipitated by adoption of the proposed corrected net book method would vary, depending on the circumstances of the ILEC in question, with some rates increasing, in extreme cases, by as much as 2,456% over those developed using the Commission's present uncorrected net book methodology. In stark contrast, USTA has not seen any evidence where use of the Commission's proposed gross book methodology would produce rate increases greater than 32.4%, a figure

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[21] Notice, ¶ 23, footnote omitted. Indeed, this was a solution proposed by Southwestern Bell in its original petition (SWB Petition at p. 3.) However, Southwestern Bell's proposal was rooted solely in the Commission's stated preference for utilizing net book costs. The Commission's proposed gross book methodology remains the preferred solution for both Southwestern Bell and USTA.

[22] Notice, ¶ 23.

lower than the lowest rate increase resulting from use of the Commission's proposed corrected net book method.[23]

The Commission's proposed corrected net book method would subject attachers to sudden and significant rate increases. Identification of the amount of net salvage to be removed from the accumulated depreciation balance would be fertile ground for additional disputes, causing pole owners, attachers, and the Commission to expend otherwise unnecessary resources. The proposed corrected net book method would also result in rates higher than the Commission's alternatively proposed gross book cost methodology. Furthermore, applying the correction on a company-by-company basis would result in a crazy-quilt pattern for resolving pole rate disputes.[24] Although it is seriously flawed, the Commission's present uncorrected net book method at least has the advantage of being universally applicable to all companies under its pole attachment jurisdiction when called upon to resolve disputes. The Commission should address the shortcomings of its present uncorrected net book method by adopting a simple methodology that can be universally applied by the Commission when resolving disputes between companies

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[23] Appendix B, Table 1.

[24] The correction would also need to be applied across all jurisdictions within those companies that would request the adjustment. The fact that the correction would be applied at all would be an acknowledgment that under-recovery of the pole account costs is a problem within that entire company. It is possible that the accounts for some states would be positive after others had become negative. Southwestern Bell is a prime example of such an instance. However, whether the problem were overt or covert, application of the correction would be *prima facie* evidence that the problem exists throughout that particular company. Accordingly, the correction would need to be applied to all jurisdictions within those companies that had detected the problem and requested the adjustment.

under its jurisdiction (i.e., the proposed gross book method), and avoiding a complex, contentious, and piecemeal methodology (i.e., the proposed corrected net book method).

IV. The Commission Should Ensure A Level Competitive Playing Field By Extending The Commission's Pole Attachment Complaint Process Both To ILEC-to-Utility And Utility-to-ILEC Agreements In Those States Where The Commission Has Jurisdiction Over Pole Attachments.

A key part of the spirit of the Telecommunications Act of 1996 is that of level competitive playing fields. Toward that end, the Commission should work to ensure that the rates utilities charge incumbent LECs to attach to poles should be just and reasonable. The Commission's Interconnection Order found that utilities are not mandated to provide access to incumbent LECs ("ILECs") seeking access to poles, ducts, conduits, and rights-of-way.[25] While reserving judgment on the validity of that finding, USTA nevertheless believes that the Commission has a compelling interest to ensure that where such access is or has been granted, the rates charged by utilities for those attachments are both just and reasonable. Disparate treatment of ILEC-to-Utility agreements in comparison to CLEC-to-Utility agreements will adversely affect ILECs, forcing them to compete on a tilted playing field, handicapped by the lack of any clear mechanism to determine just and reasonable rates, terms or conditions, or a manner in which to resolve related disputes.

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[25] Interconnection Order at ¶ 1231. ("Accordingly, no incumbent LEC may seek access to the facilities or rights-of-way of a LEC or any utility under either section 224 or section 251(b)(4).")

When originally enacted, Section 224 was designed to address the disparity in bargaining positions between utilities and cable providers seeking access to the utilities' poles for delivery of cable services. The overarching purpose of the Pole Attachment Act was "to assure that the communications space on utility poles...be made available, at just and reasonable rates, and under just and reasonable terms and conditions, to CATV systems."[26] The amendments contained in the 1996 Telecommunications Act expanded this authority to include telecommunications carriers.

In enacting the pole attachment rules, Congress and the FCC have historically sought to mitigate the control exerted by utilities. The Commission has recognized that a "utility stands in a position vis-à-vis the competitive telecommunications provider seeking pole attachment agreements that is virtually indistinguishable from that of an incumbent LEC with respect to a new entrant seeking interconnection agreements..."[27] Implicit in this statement is the Commission's view that for competition to properly thrive, all utility bottlenecks over such facilities must be eliminated.

With the prospect of ILECs becoming competitive telecommunications providers and new entrants through expansion into new telecommunications markets, the pro-competitive spirit of the Act demands that a utility's control over it poles, ducts, conduits, or rights-of-way not stand in the way of fair competition. Moreover, to the extent that an ILEC does not own or

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[26] 1977 Senate Report at p. 3.

[27] See In the Matter Danny E. Adams, Esq., Letter Ruling of Meredith Jones, Chief Cable Services Bureau, DA 97-131, 1997 FCC Lexis 375 (released January 17, 1997).

control poles, possesses poor bargaining positions in relation to a utility, or is a new market entrant, the Commission must realize that the resulting disparity -- and thus the harm created -- is no less than that experienced by any other market participant in a similar situation. Indeed, the harm created is greater because the ILEC is unable to avail itself of the Commission's pole complaint process, unlike a CLEC. Illustrative of the competitive disparity is the differential between the pole rates ILECs charge non-utility telecommunications service providers and those which utilities (primarily electric utilities) charge ILECs. The difference between the median attachment rate paid by an ILEC to an electric utility ranges anywhere from 111% to nearly 400% greater than the median of what the ILEC charges non-utility telecommunications service providers.[28] Without an adequate venue to determine just and reasonable rates or to resolve disputes, ILECs will be severely disadvantaged in their ability to compete fairly. Congress could not have intended such a situation.

In this regard, the Commission's present interpretation of Section 224 should be extended to situations outside of the interconnection context. Here, the Commission has stated:

> "[Section 224(f)(1)][29] seeks to ensure that no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in

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[28] Appendix B, Table 2. Although the information contained in this table is by no means exhaustive, it is nonetheless illustrative of the disparity that can be imposed on ILECs by electric utilities if they so choose.

[29] 47 U.S.C. § 224(f)(1) ("A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.").

those fields."[30]

The Commission has previously dealt with several Section 224 issues within its interconnection proceeding.[31] The findings of that proceeding only amplified the infirmities already present in the statute.[32] In implementing the general purposes of Section 251,[33] and the prior pole attachment rules, the Commission's most recent Section 224 rules were primarily designed to allay FCC concerns regarding the imbalance in bargaining power between ILECs and competitive telecommunications providers.

It is apparent that Congress did not speak directly to the issue at hand. Nowhere within the 1996 Conference Report or legislative history does Congress address competitive situations in which ILECs would desire, or need, access to another utility's poles, ducts, conduits, or rights-of-way. Although the Commission has already found that utilities are not mandated to provide access to ILECs, USTA believes that there still exists considerable ambiguity about the rates that utilities may charge ILECs where access is granted. Accordingly, the Commission should clear up this ambiguity by applying the intent of the Act.[34] Reasonable administrative agency

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[30] Interconnection Order at ¶ 1123.

[31] Id., at ¶¶ 1119-1240.

[32] See, e.g., Interconnection Order at ¶ 1231 ("Indeed, section 224 does not provide access rights to incumbents LECs...No incumbent LEC may seek access to the facilities or rights-of-way of a LEC or any utility under either section 224 or section 251(b)(4).").

[33] See, e.g., Interconnection Order at ¶¶ 15, 216.

[34] See, e.g., 1996 Conference Report at p.113 ("[T]o provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector (continued...)

interpretations of ambiguous statutory language accord with judicial precedent. Further, the Supreme Court has acknowledged that "[t]he power of an administrative agency to administer a congressionally created...program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicit, by Congress."[35] Because Congress did not adequately contemplate the implication of newly amended Section 224 as it pertains to agreements between ILECs and other utilities, the Commission must step into the vacuum and fill this gap, developing a reasonable accommodation of the conflicting policy concerns entrusted to its care.[36]

USTA suggests that the Commission simply extend the pole attachment complaint process in states where the Commission has jurisdiction to cover disputes between incumbent LECs and other utilities. The process is eminently applicable to such disputes and would assist in furthering the goal of fair competition. It is violative of the spirit of the Act that reasonable bounds are placed on attachment rates utilities may charge telecommunications carriers but not on what they charge incumbent LECs providing identical telecommunications service. It is especially violative if a utility is also providing competitive telecommunications services while extracting exorbitant attachment rates from an ILEC. The principle behind the original Pole

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(...continued) deployment of advanced telecommunications and information services to all Americans by opening all telecommunications markets to competition.").

[35] Morton v. Ruiz, 94 S. Ct. 1055, 1072 (1974).

[36] See generally, Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, 104 S. Ct. 2778, 2783 (1984).

Attachments Act was to ensure that pole owners recovered appropriate costs while precluding the use of that ownership as a means to extract exorbitant rental fees above and beyond the appropriate costs of owning and maintaining the pole.[37] Accordingly, that principle should similarly apply to disputes between incumbent LECs and other utilities.

V. The Explicit Statements Of Which Part 32 Accounts Are To Be Included When Calculating The Various Carrying Charge Components Remove The Ambiguity That Currently Exists And Should Be Adopted.

USTA welcomes the Commission's proposal to state explicitly which Part 32 accounts are properly included in the various carrying charge components. The switch from Part 31 to the Part 32 Uniform System of Accounts after the Pole Attachment Order without concurrently restating which Part 32 accounts were to be included caused a great deal of ambiguity. Although subsequent guidance was occasionally offered by the Commission as requested,[38] such guidance was neither comprehensive nor frequent enough to provide a reliable body of reference. Therefore, the proposed mapping is both useful and well received. USTA agrees with the Commission's tentative proposals with respect to those accounts which directly pertain to LECs. The mapping contained in Appendix B of the Notice pertaining to the administrative, maintenance, and tax components is appropriate and should be adopted.

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[37] 1977 Senate Report at p. 2.

[38] See, e.g., Letter from Kenneth P. Moran, Chief, Accounting and Audits Division, Common Carrier Bureau, to Paul Glist, Esq., Cole, Raywid, & Braverman, 5 FCC Rcd 3898 (Com. Car. Bur., June 22, 1990).

A. The Commission Should Adopt A Rebuttable Rate Of Return Of 11.25% When Resolving Rate Disputes In States That Do Not Assert Jurisdiction Over Pole Rates And No Longer Authorize Rates Of Return.

When resolving pole complaints, USTA agrees that the Commission should continue to utilize the last known rate of return authorized for LECs' intrastate services by whichever regulatory body has jurisdiction over pole rates. If a state commission has jurisdiction over pole rates, yet no longer authorizes a rate of return on intrastate services, the Commission should nevertheless defer to the state commission's jurisdiction and allow the state to determine what figure to use when resolving complaints brought before it. However, there may be states that neither regulate pole attachments, nor authorize rates of return any longer. In such cases, the Commission should apply a rebuttable rate of return of 11.25% if it believes that the last authorized rate of return is no longer accurate. The pole owner should bear the responsibility of refuting the figure of 11.25%. USTA believes that the rate of return should be rebuttable and that the pole owner, not the attacher, should be responsible for demonstrating that a different figure should be used because it is the pole owner that will have sole access to information supporting rebuttal.[39] Adopting a rebuttable rate of 11.25% would impose less of an administrative burden

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[39] In a pole rate dispute between an incumbent LEC and a cable TV operator, the Commission stated that it "still believe[s] that the weighted average cost of debt and equity is the proper cost of capital figure." In that particular case, the state no longer announced a rate of return. The Commission directed the pole-owning LEC to submit information relating to its weighted average cost of capital (debt and equity) to the Commission despite a claim by the attacher that 11.25% was the proper default rate. See, Multimedia Cablevision, Inc. v. Southwestern Bell Telephone Memorandum Opinion and Hearing Designation (continued...)

than requiring every affected LEC to submit individual company information to the Commission so that it might derive multitudinous weighted average costs of capital.

B. The Commission Should Clarify The Proper Method For Accurately Deriving The Amount Of Pole-Related Accumulated Deferred Taxes.

The Commission should take the opportunity presented by this proceeding to clarify the method for accurately deriving the proper figure for accumulated deferred income taxes when used in conjunction with the pole attachment formula. Dividing gross pole investment by the total gross plant investment and then multiplying that figure by total accumulated deferred income taxes produces a number that inaccurately represents the true figure for pole attachments. Utilizing the total accumulated deferred income tax amount improperly introduces non-pole-related deferred taxes into the subsequent rate calculations. Consequently, the actual pole-related deferred taxes get lost and overwhelmed in the aggregate. For many pole accounts, the deferred tax figure is actually negative. However, by lumping the negative pole figures into the much larger positive figures for total plant, the calculations misleadingly compute a positive figure. The end result is that pole rates are artificially lower than they would be if only pole-related deferred taxes were properly included in the calculations from the onset. Accordingly, the Commission should affirm that only pole-related accumulated deferred taxes should be utilized within the pertinent attachment formulae.

(...continued) Order, PA 95-008, CS Docket No. 96-181, FCC 96-362 (Cab. Ser. Bur., September 3, 1996) at ¶ 36 ("Multimedia Cablevision, Inc. v. Southwestern Bell Telephone").